HUP LEE COACHBUILDERS HOLDINGS SDN BHD A

v.

CYCLE & CARRIAGE BINTANG BHD

COURT OF APPEAL, PUTRAJAYA B
KN SEGARA JCA
ABU SAMAH NORDIN JCA
RAMLY ALI JCA
[CIVIL APPEAL NO: W-02(IM)-2007-2011]
1 DECEMBER 2011 C

CIVIL PROCEDURE: *Locus standi - Wound up company - Action commenced by wound up company without obtaining prior leave from court or liquidator - Locus standi - Whether action valid*

CIVIL PROCEDURE: *Striking out - Locus standi - Action commenced by wound up company without obtaining prior leave from court or liquidator - Whether company had locus standi to bring action - Whether claim arguable and sustainable - Rules of the High Court 1980, O. 18 r. 19(1)(b) & (d)* D

COMPANY LAW: *Winding up - Liquidator - Right to commence action - Action commenced by wound up company without obtaining prior leave from court or liquidator - Whether only liquidator may bring or defend any action in name of wound-up company - Whether liquidator may grant leave or sanction retrospectively - Companies Act 1965, s. 236(2)* E

COMPANY LAW: *Winding up - Right to commence action - Action commenced by wound up company without obtaining prior leave from court or liquidator - Whether action ought to be struck off - Whether leave ought to be obtained under s. 226(3) Companies Act 1965 or under s. 233(1) & (2) Companies Act 1965 - Whether liquidator may grant leave or sanction retrospectively - Whether company had locus standi to bring the action - Whether action valid* F G

On 26 June 2009 the present suit was commenced against the respondent ('the defendant') with the first plaintiff claiming RM8,127,559 and the appellant ('the second plaintiff') claiming RM11,524,080.49. At the time of filing the suit, the appellant was wound up by a court order dated 30 May 2006 and the official assignee was appointed a liquidator. The appellant had not obtained any leave either from the court or the liquidator (the official assignee) ('OA') prior to the filing of the suit. Hence, on 28 February 2011 the respondent filed the present application to strike out the appellant's claim under O. 18 r. 19(1)(b) and (d) of the Rules of the High Court 1980 ('RHC 1980') on the grounds, *inter alia* that the appellant, being a wound-up company had failed to obtain leave of the court before commencing the present action and therefore H I

A had no *locus standi* to proceed the action against the respondent. The respondent's application to strike out was allowed by the High Court on the ground that the appellant had failed to obtain leave under s. 226(3) of the Companies Act 1965 ('CA') before filing the action. The appellant appealed against this decision.

B

Held (dismissing appeal with costs)
Per Ramly Ali JCA delivering the judgment of the court:

(1) The appellant was the plaintiff (not a defendant). This was not a case where an action was brought against the wound-up company. Under s. 226(3) of the CA, leave of court is only required if the wound-up company is cited as a defendant. Therefore the issue of obtaining leave from the court under s. 226(3) did not arise. The relevant provisions relating to the present case was not s. 226(3) the CA but was s. 233(1), (2) of the CA; *HJ Industries Sdn Bhd & Anor v. Wen Ken Properties Sdn Bhd* (refd). (para 9)

(2) Section 236(2) of the CA strengthened the position that only the OA as the appointed liquidator had the power to bring or defend any action or other legal proceeding in the name and on behalf of the wound-up company. (para 15)

(3) There was no evidence to show that the commencement of the present action by the appellant itself on 26 February 2009 was done with the knowledge and authority of the OA as the liquidator. The appellant or its shareholders or creditors could not usurp the powers of the liquidator in initiating the present action against the respondent. The appellant cannot commence the action and then later, after objections raised by the respondent, apply for leave or sanction from the OA. (para 16)

(4) The authority given by the OA was dated 3 March 2011, more than two years and three months after action was filed in court. There are no provisions of law to authorise that leave or sanction of the OA is to have retrospective effect. The appellant lacked *locus standi* right from the time when the action was filed. Therefore the action was invalid and *void ab initio*. Subsequent leave or approval by the OA which came more than two years later could not legalise or validate an action which was invalid and *void ab initio*; *Cheng Heng Ping & Ors v. Perwira Affin Bank Bhd* (refd). (para 16)

(5) The appellant's case against the respondent should be struck out on the ground of failure on the part of the appellant to obtain prior leave or sanction either from the OA as liquidator or the court under s. 233(2) of the CA. This was a clear case for the court to invoke its power under O. 18 r. 19 of the RHC 1980, to ensure that any

claim brought by the appellant against the respondent has a basis on which the court may eventually adjudicate. The claim by the appellant against the respondent was obviously unarguable, unsustainable and an abuse of the process of the court. (para 18)

Case(s) referred to:
Abric Project Management Sdn Bhd v. Palmshine Plaza Sdn Bhd & Anor [2007] 7 CLJ 516 HC ***(refd)***
Cheng Heng Ping & Ors v. Perwira Affin Bank Bhd [1999] 1 CLJ 611 HC ***(refd)***
HJ Industries Sdn Bhd & Anor v. Wen Ken Properties Sdn Bhd [2005] 1 LNS 308 HC ***(refd)***
Russel v. Westpac Banking 13 ACSR 5 ***(refd)***
Zaitun Marketing Sdn Bhd v. Boustead Eldred Sdn Bhd [2010] 3 CLJ 785 FC ***(refd)***

Legislation referred to:
Companies Act 1965, ss. 226(3), 233(1), (2), 236(2), (3), 279
Rules of the High Court 1980, O. 18 r. 19(1)(b), (d)

For the appellant - Brian Cumming (YJ Yap with him); M/s Gideon Tan Razali Zaini
For the respondent - Deepinder Kaur; M/s David Lingam & Co

[Appeal from High Court, Kuala Lumpur; Suit No: D-22-1223-2009]

Reported by Amutha Suppayah

JUDGMENT

Ramly Ali JCA:

[1] This is an appeal by the 2nd plaintiff ('the appellant') against the decision of the Kuala Lumpur High Court dated 1 July 2011 in allowing the defendant's (the respondent's) application *vide* encl. 18 to strike out the appellant's claim under O. 18 r. 19(1)(b) and (d) of the Rules of the High Court 1980 ("RHC 1980").

Facts Of The Case

[2] The appellant together with the 1st plaintiff were the wholly owned subsidiaries of Kiara Emas Asia Industries Berhad. Their main businesses are manufacturing, fabrication and assembly of body parts for buses, trucks, coaches, and sale and purchase of engine chassis.

[3] The new shareholders of Kiara Emas Asia Industries Berhad found out that there were sums of monies paid to the respondent based on issuance of false invoices. Therefore on 26 June 2009 the present suit was commenced against the respondent. The 1st plaintiff's claim is for the sum of RM8,127,559 and the appellant's (the 2nd plaintiff's) claim

A is for the sum of RM11,524,080.49. At the time of filing the suit, the 2nd plaintiff ('the appellant') was wound up by a court order dated 30 May 2006 and the Official Assignee was appointed a liquidator. The appellant had not obtained any leave either from the court or the liquidator (the official assignee) prior to the filing or commencement of
B the suit. The appellant had not disclosed its winding-up status in the writ and the statement of claim.

[4] The respondent (as the defendant in the suit) objected to the appellant's *locus standi* to initiate the action. On 21 May 2010, the 1st plaintiff was directed by the court to amend its writ and statement
C of claim, to remove the appellant or to obtain sanction, but it failed to do so. Thus, the action was struck out, as the amendment was not made as directed.

[5] On 12 November 2010, on the appellant's application the action
D was reinstated on condition that if sanction was not obtained by 30 November 2010, the 1st plaintiff was to amend the statement of claim and remove the appellant (the 2nd plaintiff) from the action; or alternatively if sanction was obtained by 30 November 2010, the plaintiffs were to write to the Managing Judge Unit to fix for a case
E management. Conditional sanction was communicated by the official assignee office to the appellant's solicitor *vide* his letter dated 29 November 2010. Finally, on 3 March 2011 the appellant had obtained the sanction after fulfilling all the relevant requirements or conditions as stated in the letter dated 29 November 2010.

F **[6]** In the meantime, on 28 February 2011 the respondent filed the present application to strike out the appellant's claim against the respondent under O. 18 r. 19(1)(b) and (d) of the RHC 1980 on the grounds, *inter alia* that the appellant, being a wound-up company has failed to obtain leave of the court before commencing the present action
G and therefore has no *locus standi* to proceed the action against the respondent; and the appellant's action is therefore vexatious, frivolous and scandalous, and also an abuse of the process. On 1 July 2011, the said application to strike out was allowed by the High Court. Hence the present appeal before us.

H **[7]** The learned counsel for the appellant submitted here as well as at the court below, that there is no basis whatsoever for the respondent to strike out the appellant's claim in this action as it is trite that the appellant does not need to obtain leave under s. 226(3) of the Companies Act 1965 to continue with this action. The appellant
I maintained that s. 226(3) requires that leave is only to be obtained if the action is brought against the wound up company (as a defendant), but not where the wound up company is the one who instituted or commenced the suit as a plaintiff to the proceedings.

[8] The respondent on the other hand, submitted that once a company is wound-up, all assets and affairs of the company is in the hand of the liquidator; and pursuant to s. 233(1)(2) of the Companies Act 1965, the liquidator has control of all the property and things in action to which the company is or appears to be entitled and it is the appointed liquidator who has the discretion to proceed or to commence an action on behalf of the company.

Findings Of This Court

[9] In the present case, the suit in question is an action commenced or brought by the wound-up company (the appellant). The appellant was the plaintiff (not a defendant) in the said action. This is not a case where an action was brought against the wound-up company. Under s. 226(3) of the Companies Act 1965, leave of court is only required if the wound-up company is cited as a defendant. Therefore the issue of obtaining leave from the court under s. 226(3) does not arise. Section 226(3) is not applicable here. (See: *Hj Industries Sdn Bhd & Anor v. Wen Ken Properties Sdn Bhd* [2005] 1 LNS 308).

[10] The relevant provisions relating to the present case is not s. 226(3) of the Companies Act 1965 as submitted by the appellant's counsel, but s. 233(1)(2) of the same Act which provides:

> (1) Where a winding-up order has been made or a provisional liquidator has been appointed, the liquidator or provisional liquidator shall take into his custody or under his control all the property and things in action to which the company is or appears to be entitled.
>
> (2) The court may, on the application of the liquidator, by order direct that all or any part of the property of whatsoever description belonging to the company or held by trustees on its behalf shall vest in the liquidator and thereupon the property to which the order relates shall vest accordingly and the liquidator may, after giving such indemnity, if any, as the court directs, bring or defend any action or other legal proceeding which relates to that property or which it is necessary to bring or defend for the purpose of effectually winding up the company and recovering its property.

[11] It is a fundamental principle of law that once a limited company is wound-up, its assets and liabilities vests in the liquidator appointed. It is up to him to decide whether to institute, continue the prosecution of, or defend legal proceedings. However, there is jurisdiction in the court to authorise other persons to conduct litigation in the name of the company. This principle was adopted by the Federal Court in the case of *Zaitun Marketing Sdn Bhd v. Boustead Eldred Sdn Bhd* [2010] 3 CLJ 785.

[12] In *Russel v. Westpac Banking* 13 ACSR 5, King CJ when delivering the judgment of the Full Court of South Australia said:

> When the company is in liquidation, the person in whom is vested the authority to institute proceedings, is the liquidator: *Scarel Pty Ltd v. City Loan & Credit Corporation Pty Ltd* [1988] 12 ACLR 730. There is power, however, in the court to authorise other persons to conduct litigation in the name of the company: *Cape Breton Company v. Fenn* [1881] 17 Ch D 198; *Aliprandi v. Griffith Ventures Pty Ltd* [1991] 6 ACSR 250.

[13] In the present case, it is not in dispute that at the time when the present action was initiated or commenced by the appellant (as the 2nd plaintiff) against the respondent on 26 February 2009, the appellant was already wound-up since 30 May 2006. It is also not in dispute that at that time the appellant had not obtained any leave either from the official assignee, nor from the court to commence the said action. Unconditional leave from the official assignee office was only obtained on 3 March 2011, after the appellant had fulfilled all the necessary requirements imposed by the official assignee (by that time the respondent had already filed the present application to strike out the appellant's action).

[14] At the time of filing the present action all the property as well as things in action to which the appellant company was or appeared to be entitled, were vested in the liquidator appointed (the official assignee). It was only the official assignee who can bring or defend any action or other legal proceedings which relates to that property or which it was necessary to bring or defend for the purpose of effectually winding-up the company and recovering its property. In other words, only the official assignee has the necessary *locus standi* to commence the action on behalf of the appellant company against the respondent. The appellant company itself or its shareholders or its directors have no *locus standi* to do so without the leave of the official assignee or the court. An action filed by the appellant without any leave from the official assignee (as liquidator) or the court or filed by the appellant without having any *locus standi* to do so in law is clearly illegal and invalid. The said action ought to be struck out.

[15] Section 236(2) of the Companies Act 1965 strengthens the position that only the official assignee as the appointed liquidator has the power to bring or defend any action or other legal proceedings in the name and on behalf of the wound-up company. If for whatever reason, the official assignee as the liquidator is unwilling to initiate the action in the name of the wound-up company, a creditor or a contributory can apply to the court under ss. 236(3) or 279 of the Companies Act 1965 seeking an order that the liquidator be compelled to initiate the action in

the name of the wound-up company or that leave be given to the creditor or contributory himself to bring the action in the name of the company. (See: *Abric Project Management Sdn Bhd v. Palmshine Plaza Sdn Bhd & Anor* [2007] 7 CLJ 516; and *Zaitun Marketing Sdn Bhd v. Boustead Eldred Sdn Bhd (supra)*). Again, to do so, the creditor or the contributory must have obtained leave of the court before commencing the action in the name and on behalf of the wound-up company.

[16] There is no evidence to show that the commencement of the present action by the appellant itself on 26 February 2009 was done with the knowledge and authority of the official assignee as the liquidator. Clearly, the appellant or its shareholders or creditors cannot usurp the powers of the liquidator in initiating the present action against the respondent. The appellant cannot commence the action and then later, after objections raised by the respondent, apply for leave or sanction from the official assignee. The authority given by the official assignee is dated 3 March 2011, more than two years and three months after action was filed in court. There are no provisions of law to authorise that leave or sanction of the official assignee is to have retrospective effect. The appellant lacks *locus standi* right from the time when the action was filed. Therefore the action was invalid and *void ab initio*. Subsequent leave or approval by the official assignee office which came more than two years later cannot legalise or validate an action which was invalid and *void ab initio*.

[17] On the same issue, we are in agreement with Abdul Malik Ishak, J in the case of *Cheng Heng Ping & Ors v. Perwira Affin Bank Bhd* [1999] 1 CLJ 611 when His Lordship stated as follows:

> After Campall had been wound up, all the properties of Campall came under the control of the Official Assignee as the liquidator. Now, when the present suit was filed on 18 September 1997, the present plaintiffs were no longer in control of Campall and therefore the present plaintiffs have no legitimate right to proceed with the present suit. To allow the present plaintiffs to proceed with the present suit would tantamount to giving them the right to claim on behalf of Campall at the expense of the Official Assignee and other creditors of Campall. This would open the floodgate. Imagine the situation where former directors or shareholders of a company that has been wound up, take control and oust the liquidator by filing a civil suit against the debtors of the company in their individual names and benefit themselves only without regard to the liquidator and the creditors of the company. Chaos would prevail. The rights of the liquidator and creditors would be at stake. In my judgment, it was an abuse of the process of the court when the present plaintiffs filed the present civil suit.

A

Conclusion

[18] The learned High Court judge allowed the respondent's application to strike out the appellant's claim on the ground that the appellant had failed to obtain leave under s. 226(3) of the Companies Act 1965 before filing the action against the respondent. We respectively agree with the learned judge that the appellant's claim against the respondent should be so struck out but for a different reason than that was given by the learned judge. As stated earlier, we are of the view that s. 226(3) is not applicable in the present case because the action in question is not proceeded with or commenced against the appellant, but commenced by the appellant against the respondent. We are of the view that the action by the appellant against the respondent should be struck out on the ground of failure on the part of the appellant to obtain prior leave or sanction either from the official assignee as liquidator or the court under s. 233(2) of the Companies Act 1965.

[19] This is a clear case for the court to invoke its power under O. 18 r. 19 of the RHC 1980, to ensure that any claim brought by the appellant against the respondent has a basis on which the court may eventually adjudicate. With respect, the present claim by the appellant against the respondent is obviously unarguable, unsustainable and an abuse of the process of the court.

[20] On the above considerations, we dismiss the appeal with costs of RM10,000 to the respondent. We also make an order that the deposit be paid to the respondent on account of fixed costs.